

Fall 1995

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Amanda Bartlett Mook

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Recommended Citation

Amanda Bartlett Mook, *Death of Res Gestae and Other Developments in Missouri Hearsay Law, The*, 60 Mo. L. REV. (1995)

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The Death of Res Gestae and Other Developments in Missouri Hearsay Law

*Bynote v. National Super Markets, Inc.*¹

I. INTRODUCTION

Res gestae is a Latin term that has had many meanings in American courts. Courts have used it when referring to a variety of hearsay exceptions, such as the excited utterance exception, the present sense impression exception, the verbal part of the act doctrine, and statements of mental or physical condition.² In *Bynote v. National Super Markets, Inc.*, the Missouri Supreme Court determined that the use of the term *res gestae* should be abandoned in favor of the specific hearsay exceptions it has covered.³

The court also held that any requirement of executive capacity to meet the vicarious admission of a party-opponent hearsay exception should be abandoned.⁴ In addition, the court reviewed Missouri law pertaining to the state of mind and excited utterance hearsay exceptions.⁵

II. FACTS AND HOLDING

Cynthia Bynote brought this negligence action against National Super Markets ("National").⁶ Bynote entered one of National's stores to do some grocery shopping on February 12, 1989.⁷ As she approached the checkout counter with her groceries, she slipped on some liquid on the floor and fell,⁸ injuring her back.⁹ Bynote remained on the floor for a few minutes as she tried to collect herself.¹⁰ While she was still on the floor, a uniformed bagger approached and asked if she was okay.¹¹ According to Bynote, a

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1. 891 S.W.2d 117 (Mo. 1995).
 2. See *infra* notes 45-49 and accompanying text.
 3. See *infra* notes 30 and 123 and accompanying text.
 4. See *infra* note 140 and accompanying text.
 5. See *infra* notes 124-134 and accompanying text.
 6. *Bynote*, 891 S.W.2d at 119.
 7. *Id.*
 8. *Id.*
 9. *Id.* at 125.
 10. *Id.* at 120.
 11. *Id.*

checker then came around the counter and said to the bagger, "I told you to get that water up."¹² The bagger answered, "I did."¹³ The checker replied, "Well, I can see the suds from here."¹⁴ Both the bagger and the checker then walked away, leaving Bynote on the floor.¹⁵ When she got up, she could see water on the floor, and she realized her hands and the seat of her pants were wet.¹⁶ She paid for her groceries and left without speaking to a manager.¹⁷

Bynote reported the accident to the store manager a couple of days later.¹⁸ The manager checked with the assistant manager who had been on duty when the accident occurred.¹⁹ He said he had no knowledge of Bynote's fall.²⁰

The manager testified that it is part of a bagger's duties to clean up spills, and any employee could tell a bagger to clean up a spill.²¹ The bagger and the checker were not deposed and did not testify.²²

National filed a motion for directed verdict.²³ The motion asserted that Bynote failed to make a submissible case because (1) her testimony concerning the statements made by National's employees was not admissible, and (2) without that testimony, Bynote could not show that National knew, or by using ordinary care should have known, of the dangerous condition.²⁴

Bynote argued that the testimony is admissible under at least one of three possible exceptions to the hearsay rule: State of mind, excited utterance, or admission of a party-opponent.²⁵ The trial court allowed Bynote's testimony, over National's objection, based on the exception to the hearsay rule for excited utterances.²⁶ The jury returned a verdict for Bynote.²⁷

The Eastern District Court of Appeals found that Bynote's testimony as to the statements of the bagger and checker was inadmissible hearsay, and,

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 119.

therefore, Bynote did not make a submissible case.²⁸ The court reversed the judgment below.²⁹

The Missouri Supreme Court accepted transfer. The court first stated that the term *res gestae* would no longer be recognized as a hearsay exception.³⁰ The court then found that Bynote's testimony was not admissible under the state of mind exception,³¹ holding that when the statement showing notice is made after the incident in question, it is not admissible.³² As to the argument that Bynote's testimony should be allowed under the excited utterance exception to the hearsay rule,³³ the court held that when the out-of-court declarant did not witness the startling event and the declarations were not pertaining to the incident itself, they are not admissible as excited utterances.³⁴

The court determined that the statements of the bagger and checker were vicarious admissions of a party-opponent.³⁵ As such, Bynote's testimony was admissible, and she made a submissible case.³⁶ The court held that when an employee or agent makes an admission while acting within the scope of his authority, that admission is admissible against the employer or principal.³⁷

III. LEGAL BACKGROUND

A. *Res Gestae* as a Hearsay Exception

*Res gestae*³⁸ is a Latin term meaning literally "the thing done"³⁹ or "a transaction."⁴⁰ The term has been used by courts since the late eighteenth century.⁴¹ It applied to statements made contemporaneously with conduct at

28. *Id.*

29. *Id.*

30. *Id.* at 121.

31. *Id.* at 122.

32. *Id.*

33. *Id.* at 122-23.

34. *Id.*

35. *Id.* at 124.

36. *Id.*

37. *Id.*

38. Also referred to as *res gesta* and *res acta*. 6 WIGMORE ON EVIDENCE § 1767 (Chadbourn rev. ed. 1976).

39. WIGMORE, *supra* note 38, § 1746.

40. WIGMORE, *supra* note 38, § 1767.

41. *Id.*

issue.⁴² When a court applied *res gestae*, it would say something like, "What was said by the agent relating to such transaction . . . will be received as evidence against the principal, as part of the 'res gestae'."⁴³ Professor Thayer found that this use of *res gestae* probably arose due to confusion in the law of hearsay. The "convenient obscurity" of the phrase allowed courts to use it as a "catch-all" when they wanted to allow hearsay to come in but did not know which specific exception should apply.⁴⁴

Over the years, *res gestae* has been used to refer to numerous principles of admissibility of evidence. The most common applications include the hearsay exceptions for spontaneous exclamations, including excited utterances and present sense impressions;⁴⁵ the verbal part of the act doctrine, where the statements are actually part of the issue in the case (for example, defamation);⁴⁶ statements of a mental or physical condition;⁴⁷ and various other situations where declarations are relevant but courts do not state the specific reasons for admitting them.⁴⁸ The main rationale for virtually all of the statements covered by the *res gestae* exception is the idea that spontaneity insures trustworthiness.⁴⁹

In Missouri, *res gestae* has been applied to "verbal act" statements,⁵⁰ dying declarations,⁵¹ excited utterances,⁵² and declarations of state of mind.⁵³ It also has been used to refer to the admissibility of statements of

42. 2 MCCORMICK ON EVIDENCE § 268 (John W. Strong, ed. 1992).

43. WIGMORE, *supra* note 38, § 1767, citing Professor James B. Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gesta*, 15 AM. L. REV. 1, 5-10 (1881) (citing SWIFT'S DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES 127 (1810) the earliest American treatise).

44. WIGMORE, *supra* note 38, § 1767 (quoting Professor James B. Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gesta*, 15 AM. L. REV. 1, 5-10 (1881)).

45. MCCORMICK, *supra* note 42, § 268.

46. WIGMORE, *supra* note 38, § 1767.

47. MCCORMICK, *supra* note 42, § 268.

48. WIGMORE, *supra* note 38, § 1770.

49. MCCORMICK, *supra* note 42, § 268.

50. *See* *Hamilton v. Missouri Petroleum Prods. Co.*, 438 S.W.2d 197, 199-200 (Mo. 1969); *Sconce v. Jones*, 121 S.W.2d 777, 781 (Mo. 1938); *Stephen v. Lindell Hosp.*, 681 S.W.2d 503, 505-506 (Mo. Ct. App. 1984); *State v. McClure*, 504 S.W.2d 664, 671-72 (Mo. Ct. App. 1974).

51. *See* *State v. Booth*, 515 S.W.2d 586, 591 (Mo. Ct. App. 1974).

52. *Hamilton*, 438 S.W.2d at 199-200; *Wren v. St. Louis Public Serv. Co.*, 333 S.W.2d 92, 94-95 (Mo. 1960); *Jones v. Wahlic*, 667 S.W.2d 729, 730 (Mo. Ct. App. 1984); *Walsh v. Table Rock Asphalt Constr. Co.*, 522 S.W.2d 116, 120-21 (Mo. Ct. App. 1975); *McClure*, 504 S.W.2d at 671-72.

53. *Emcasco Ins. Co. v. Donnelly*, 607 S.W.2d 460, 463 (Mo. Ct. App. 1980).

one co-conspirator against the other,⁵⁴ statements of employees independent of a finding of authority,⁵⁵ and statements of deceased persons where the statements are not dying declarations.⁵⁶

The Missouri Supreme Court has said that "declarations made contemporaneously with, or immediately preparatory to, a particular litigated act, which tend to illustrate and give character to the act in question are admissible as a part of the *res gestae*."⁵⁷ More recently the court said that *res gestae* encompasses two general types of hearsay statements.⁵⁸ First, it covers present sense impressions, which are statements made contemporaneously with the event at issue.⁵⁹ The event does not have to be startling. The factor that ensures the statement's trustworthiness is that it is contemporaneous with the event at issue.⁶⁰

The second type of hearsay statements covered by *res gestae* are excited utterances or spontaneous exclamations.⁶¹ The use of *res gestae* as a hearsay exception has been criticized for many years by Missouri courts, yet its use has continued.⁶²

54. *State v. Newberry*, 605 S.W.2d 117, 125 (Mo. 1980).

55. *Roush v. Alkire Truck Lines, Inc.*, 299 S.W.2d 518, 520-21 (Mo. 1957).

56. *State v. Sutton*, 454 S.W.2d 481, 487 (Mo. 1969).

57. *Lewis v. Lowe & Campbell Athletic Goods Co.*, 247 S.W.2d 800, 804 (Mo. 1952).

58. *State v. White*, 621 S.W.2d 287, 295 (Mo. 1981).

59. *Id.*

60. *Id.*

61. *Id.* This exception is covered more fully below. *See infra* notes 63-75 and accompanying text.

62. *See State v. Williams*, 673 S.W.2d 32, 34 (Mo. 1984) ("Modern commentators discourage the use of the term '*res gestae*' as lacking in analytical precision, and as covering different hearsay exceptions having diverse rationale."); *Meyers v. Smith*, 300 S.W.2d 474, 477 (Mo. 1957) ("For more than seventy-five years the distinguished legal scholars have repeatedly pointed out, with complete unanimity, the fallacies and unsoundness of *res gestae* as a rule of evidence . . ."); *Id.* at 477 ("Missouri's bench and bar, with rare notable exceptions, . . . instead of candidly recognizing certain contemporaneous or spontaneous exclamations and utterances as a legitimate and basically sound exception to the hearsay rule, . . . have stubbornly clung to the shibboleth of the meaningless latin phrase."); *State v. Buckner*, 810 S.W.2d 354, 358 note 1 (Mo. Ct. App. 1991) ("The term *res gestae* is now discountenanced as a tool of analysis of the admissibility of evidence."); *Jones v. Wahlic*, 667 S.W.2d 729, 730 (Mo. Ct. App. 1984) ("To the extent more precise terminology may be employed, the phrase '*res gestae*' should be avoided."); *Walsh*, 522 S.W.2d at 120.

B. The Hearsay Exception for Excited Utterances

The general rule is that statements made spontaneously after some startling or exciting event, while the declarant is still under the influence of that event, are admissible despite falling within the definition of hearsay.⁶³ The event must be "sufficiently startling to render inoperative the normal reflective thought processes of the observer," and the statement must be "a spontaneous reaction to the occurrence or event and not the result of reflective thought."⁶⁴ The theory is that trustworthiness is ensured by the suspension of the declarant's ability to reflect; the risk of fabrication is greatly diminished.⁶⁵ Based on this theory, the availability of the declarant at trial is immaterial; the excited utterance is likely to be as reliable, if not more reliable, than the declarant's testimony on the stand.⁶⁶

Missouri courts adhere to this general explanation of the excited utterance exception to the hearsay rule.⁶⁷ Some Missouri courts, however, have added the requirement that the statement relate to the circumstances of the startling event.⁶⁸ In deciding whether or not the exception is applicable to a particular statement, Missouri courts consider a number of factors. These factors include the lapse of time between the event and the statement, the physical and mental condition of the declarant at the time the declaration was made, whether the declarant was responding to a question, and the self-serving or purposeful nature of the declarant's statement.⁶⁹ None of these factors should be determinative. For example, a statement favorable to the declarant is not necessarily excluded.⁷⁰

If a statement is an opinion or conclusion of fact reached by inferences drawn from other facts, it may be excluded.⁷¹ Some courts have found that this tends to show reflection and reasoning, not the necessary spontaneity.⁷²

There has been some disagreement among Missouri courts as to the correct standard of review to be used by appellate courts when evaluating

63. WIGMORE, *supra* note 38, § 1746.

64. MCCORMICK, *supra* note 42, § 272. The declarant need not actually be involved in the event. *Id.*

65. *Id.*

66. *Id.*

67. *State v. Williams*, 673 S.W.2d 32, 34 n.2 (Mo. 1984); *Walsh*, 522 S.W.2d at 120-21.

68. *State v. Alexander*, 729 S.W.2d 486, 489-90 (Mo. Ct. App. 1987).

69. *Jones*, 667 S.W.2d at 731.

70. *Id.*

71. *See Sconce v. Jones*, 121 S.W.2d 777, 781-82 (Mo. 1938); *Stephen*, 681 S.W.2d at 507; *Walsh*, 522 S.W.2d at 121.

72. *Walsh*, 522 S.W.2d at 121.

whether the declarant was under the influence of the startling event. It would seem that it is a question of fact, and as such the reviewing court should give great deference to the trial court's determination. WIGMORE espouses this view, or a more extreme one of complete deference.⁷³ Some appellate courts in Missouri have professed to give at least some deference to the trial courts.⁷⁴ In contrast, the Missouri Supreme Court has held that admissibility is a question of law.⁷⁵

C. *The State of Mind Exception*

Direct assertions about a person's own mental or physical condition have been covered by a hearsay exception for some time.⁷⁶ The rationale for admitting such statements involves the relative value and reliability of the evidence.⁷⁷ Testimony as to statements the declarant made contemporaneously with the incident in question are likely to be more reliable than the declarant's testimony on the stand, where there is opportunity for misrepresentation and no way to test the assertion.⁷⁸ As a consequence of this rationale, such statements are admissible regardless of the availability of the declarant.⁷⁹

The hearsay exception for direct assertions of the declarant's mental state should be distinguished from using the declarant's statements to indirectly or circumstantially show a then-existing state of mind.⁸⁰ The latter use of the declarant's utterances is arguably not hearsay since the statements are not being used to prove that the fact asserted is true.⁸¹ Courts tend to fail to distinguish between the two scenarios. They instead apply the state of mind

73. WIGMORE, *supra* note 38, § 1750.

74. *Jones*, 667 S.W.2d at 731.

75. *Williams*, 673 S.W.2d at 35 ("The trial judge has a measure of discretion, . . . but the question of admissibility is basically a question of law subject to appellate review.").

76. WIGMORE, *supra* note 38, § 1714. For example, statements such as, "I know there is ketchup on the floor," or "I feel sick."

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* § 1715.

81. For example, the statement, "Look out—there is ketchup on the floor!" could be used to prove that there was ketchup on the floor (the truth of the matter asserted) or that the declarant had knowledge of the spill (as circumstantial evidence of the declarant's then existing mental state). The first use is hearsay, and the statement would not be admissible under the state of mind exception. The second use is not hearsay since the statement is not being used to prove the truth of the matter asserted, so the statement should be admissible.

exception⁸² to both, thus ignoring the fact that some of the statements are not hearsay at all.⁸³

Missouri's state of mind hearsay exception allows an out-of-court statement into evidence where the statement was contemporaneous with the event at issue, the statement reflects a then-existing mental state, and the then-existing mental state is relevant to a genuine issue in the case.⁸⁴ Missouri courts may also include an additional requirement that the statement must be made "in a natural manner, and not under circumstances of suspicion."⁸⁵

The state of mind exception covers both statements directly asserting a state of mind and statements inferentially establishing a mental state. Some Missouri courts have distinguished between the two, recognizing that the latter type of statement is not hearsay at all.⁸⁶ When using an out-of-court statement to prove that the declarant had knowledge or notice, it will be admitted under the state of mind exception only if it is being used to prove the declarant had knowledge *at the time of the declaration*.⁸⁷ If the statement is used to show *prior* knowledge, it is inadmissible hearsay.⁸⁸ This result makes sense under the general rule because the statement would not prove a then-existing mental state but rather a prior- or continuously-existing mental state. The then-existing mental state of the declarant (where the statement is made after the accident) is irrelevant. It may seem that a court should be able to infer backwards and extend a mental state to show prior knowledge, but backward use of the inference of continuity is generally discouraged.⁸⁹

82. The Federal Rules of Evidence term this exception "then existing mental, emotional, or physical condition." FED. R. EVID. 803(3).

83. MCCORMICK, *supra* note 42, § 274.

84. Kelly v. St. Luke's Hosp., 826 S.W.2d 391, 396-97 (Mo. Ct. App. 1992) (citing Missouri Cafeteria, Inc. v. McVey, 242 S.W.2d 549, 554 (Mo. 1951)) (a statement of then-existing motive or reason for conduct is admissible).

85. Lewis v. Lowe & Campbell Athletic Goods Co., 247 S.W.2d 800, 804-05 (Mo. 1952).

86. Singh, 586 S.W.2d at 417. See *supra* note 81 and accompanying text.

87. Jordan v. Robert Half Personnel Agencies, 615 S.W.2d 574, 583-84 (Mo. Ct. App. 1981) (emphasis added).

88. *Id.* at 583 (emphasis added).

89. See Brock v. Gulf, Mobile and Ohio R.R. Co., 270 S.W.2d 827, 831-32 (Mo. 1954) (stating the general rule that "the presumption of the continued existence of a proven fact does not run backward," but then allowing a backward inference of continuity under the facts of the case); and Liverpool & London & Globe Ins. Co. v. Nebraska Storage Warehouses, Inc., 96 F.2d 30, 36 (8th Cir. 1938) ("[I]t is often said that while a given condition shown to exist at a given time, may be presumed to have continued, there is not, on the other hand, any presumption that it existed previous to the time shown."). But see State v. Donahue, 585 S.W.2d 160, 162 (Mo. Ct. App. 1979) (quoting WIGMORE ON EVIDENCE, 3rd ed., § 2530: "The prior or the subsequent

In a case with a fact pattern remarkably similar to *Bynote*, the Missouri Court of Appeals explained the distinction:

[T]he contents of the [employee's] statement must have been offered to prove the truth of the matter asserted because [the plaintiff] offered no other evidence. . . . of the existence of the substance on the floor. . . . If the truth or falsity of the [employee's] statement was not relevant and was in fact offered simply to show that [the defendant] knew of the existence of the substance, knowledge would only be from the time that the statement was made by the [employee]—after [the defendant] fell.⁹⁰

Testimony as to statements made to a party will be admitted to show notice or knowledge of a dangerous condition in general if the statements were made prior to the accident at issue.⁹¹

Missouri courts may also include other evidentiary doctrines in the state of mind exception. For example, at least one Missouri court applied the verbal act doctrine while calling it the state of mind exception.⁹² In addition, Missouri courts apparently recognize the *Hillmon* doctrine and include it within this exception, although it has not been expressly adopted.⁹³ Under the doctrine established in *Mutual Life Insurance Co. of New York v. Hillmon*,⁹⁴ statements of the declarant's then existing intent to act can be used to prove that the declarant subsequently carried out that intent or performed the act.⁹⁵

existence of . . . a fact is always evidential to show its existence at a time in issue . . . The probability of continuance depends much, of course, on the nature of the specific fact and the circumstances of each case."); and *Whitney v. Central Paper Stock Co.*, 446 S.W.2d 415, 419 (Mo. Ct. App. 1969) (noting circumstances where backward use of the inference of continuity has been allowed in Missouri).

90. *Hunt v. National Super Markets, Inc.*, 809 S.W.2d 157, 160 (Mo. Ct. App. 1991).

91. *Vinyard v. Vinyard Funeral Home, Inc.*, 435 S.W.2d 392, 396 (Mo. Ct. App. 1968). In *Bynote*, the court included this circumstance in the state of mind exception, although the *Vinyard* opinion did not identify the hearsay exception it was using.

92. *State v. Buckner*, 810 S.W.2d 354, 358-59 (Mo. Ct. App. 1991). Statements made contemporaneously with an action which help to explain the act by showing the declarant's motive or reason for acting are verbal acts under Missouri law. *Id.*

93. JOHN C. O'BRIEN, *MISSOURI LAW OF EVIDENCE* § 11-18 (2d ed. 1989).

94. 145 U.S. 285 (1892).

95. *Id.* at 295-97.

D. Vicarious Admissions by a Party-Opponent

Vicarious admissions by a party-opponent actually involve two different concepts. The first is the exception to the hearsay rule known as admission of a party-opponent, and the second is the attribution of such an admission made by an employee to the party-opponent employer.

According to WIGMORE, relevant statements made out of court by a party-opponent are always admissible when they are used against him.⁹⁶ The admission does not have to have been against the party-opponent's interest at the time it was made.⁹⁷ Anything the party-opponent said in the past that is now inconsistent with the facts asserted by him in pleadings or in testimony is admissible.⁹⁸

An admission offered for the truth of the matter asserted falls within the literal definition of hearsay, but it is admissible because it does not fit within the rationale for the hearsay rule.⁹⁹ The only person who would object to the admission and invoke the hearsay rule would be the party-opponent himself, and he does not need the protection of the rule because he does not need to cross-examine himself to test the veracity of the statement.¹⁰⁰ When a statement is offered by the party-opponent in support of his case, it then falls within the reach of the hearsay rule and is not admissible, unless some other exception to the rule applies.¹⁰¹

Missouri courts adhere to the general rule with some minor variations. A statement or conduct will be considered an admission by a party-opponent if: (1) it is a conscious or voluntary acknowledgement by the party-opponent of the existence of certain facts; (2) the matter acknowledged is relevant to the case of the party offering the admission; and (3) the matter acknowledged is unfavorable to, or inconsistent with, the position taken at trial by the party-opponent.¹⁰² Missouri courts follow the rationale for the exception espoused by WIGMORE.¹⁰³

96. 4 WIGMORE ON EVIDENCE § 1048 (Chadbourn rev. ed. 1976).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *See Overland Outdoor Advertising Co. v. State of Missouri ex rel. Missouri Highway and Transportation Comm'n*, 877 S.W.2d 158, 160 (Mo. Ct. App. 1994); *Copeland v. Mr. B's Pool Centers, Inc.*, 850 S.W.2d 380, 382 (Mo. Ct. App. 1993); *Around the World Importing, Inc. v. Mercantile Trust Co., N.A.*, 795 S.W.2d 85, 89 (Mo. Ct. App. 1990); *United Services of America, Inc. v. Empire Bank*, 726 S.W.2d 439, 444 (Mo. Ct. App. 1987).

103. *See Stratton v. City of Kansas City*, 337 S.W.2d 927, 931 (Mo. 1960); *State*

According to Missouri courts, the statement does not have to be a direct admission of the ultimate fact at issue. It should come in if it relates even circumstantially or incidentally to the issue.¹⁰⁴ In addition, an admission is admissible even if it contains an opinion, as long as the opinion is within the scope of the personal knowledge of the declarant.¹⁰⁵ Missouri courts disagree as to whether statements that reach a legal conclusion should be admissible.¹⁰⁶

Some Missouri courts have referred to admissions of a party-opponent as admissions against interest.¹⁰⁷ This results from confusion of admission of a party-opponent with declarations against interest.¹⁰⁸

Vicarious admissions of a party-opponent are made not by the party-opponent himself but by an employee or agent of the party-opponent. A statement falls within the vicarious admission of a party-opponent exception if it fits within the rationale for the admission of a party-opponent exception

v. Morris, 654 S.W.2d 186, 187 (Mo. Ct. App. 1983).

104. *White v. Burkeybile*, 386 S.W.2d 418, 422 (Mo. 1965); *Around the World Importing*, 795 S.W.2d at 89; *Coulter v. Michelin Tire Corp.*, 622 S.W.2d 421, 433 (Mo. Ct. App. 1981), *cert. denied*, *Michelin Tire Corp. v. Coulter*, 456 U.S. 906 (1982).

105. *Cummings v. Tepsco Tenn. Pipe & Supply Corp.*, 632 S.W.2d 498, 501 (Mo. Ct. App. 1982).

106. *Fahy v. Dresser Indus., Inc.*, 740 S.W.2d 635, 642 (Mo. 1987), *cert. denied* by *Dresser Indus., Inc. v. Fahy*, 485 U.S. 1022 (1988) (legal conclusions are not admissible); *Coldwell Bankers - Gordon Co. Realtors v. Waters*, 791 S.W.2d 412, 415 (Mo. Ct. App. 1990) ("A party's admissions of fact constitute admissible evidence as admissions against interest; conclusions of law do not."); *cf. Cummings*, 632 S.W.2d at 501 ("A party may relate his opponent's verbal opinion as to fault in a negligence action, and the evidence is admissible as an admission against interest.").

107. *Carpenter v. Davis*, 435 S.W.2d 382, 384 (Mo. 1968); *White*, 386 S.W.2d at 422; *McClanahan v. Deere & Co.*, 648 S.W.2d 222, 228 (Mo. Ct. App. 1983); *Cummings*, 632 S.W.2d at 501.

108. *United Services of America*, 726 S.W.2d at 443 ("Missouri attorneys, and sometimes the courts, often use the terms 'admission against interest' and 'declaration against interest' interchangeably. This causes unnecessary confusion and uncertainty as to what the speaker is attempting to communicate. The appellate courts of this state have long recognized that there is a valid distinction. . . .")

Admissions of a party-opponent differ from declarations against interest in several ways. A declaration against interest must have been against the declarant's interest when made, unlike an admission. *MCCORMICK*, *supra* note 38, § 254. An admission must be a statement of a party to the lawsuit and must be offered against the party-opponent. *Id.* In contrast, declarations against interest do not have to be made by a party and may be offered by either party. *Id.* Also, to be admissible, the person who made the declaration must be unavailable, whereas availability is immaterial with admissions. *Id.*

and it can be attributed to the party-opponent. The clearest case of admissibility under this exception occurs when the person who made the admission had express authorization from the party-opponent to speak.¹⁰⁹ In the absence of express authority, the generally accepted view is that an out-of-court statement made by an agent or employee of the party-opponent should be admitted if it concerns a matter within the scope of the declarant's employment and was made while the employment relationship continued.¹¹⁰

In Missouri, the general rule is that an admission of an employee will be admissible against the employer if the employee was acting within the scope of his authority when he made the statement.¹¹¹ This appears to be somewhat different than the generally accepted rule noted earlier. "Within the scope of authority" could be construed as a narrower exception than the general rule of within the scope of employment.¹¹²

A variation on Missouri's general rule developed in *Missouri State Highway Commission v. Howard Construction Co.*¹¹³ The court found that to be within the scope of the employee's authority, the employee usually must have some executive capacity.¹¹⁴ This requirement arose from apparent authority situations; an employee is deemed to have authority to make statements when the employer created an appearance of authority leading third

109. MCCORMICK, *supra* note 42, § 259.

110. *Id.* at 158. The Federal Rules of Evidence adhere to this view. FED. R. EVID. 801(d)(2)(D). The federal rules also do not consider admissions by a party-opponent to be hearsay at all. *Id.* at 801(d).

111. *Roush*, 299 S.W.2d at 521 (scope of authority of driver to drive truck does not include authority to make admission of negligence related to driving the truck). Some courts use the words "scope of employment" but then narrowly interpret them. *See Schultz v. Webster Groves Presbyterian Church*, 726 S.W.2d 491, 497 (Mo. Ct. App. 1987).

112. *See* MCCORMICK, *supra* note 42, § 259. McCormick distinguishes "within the scope of authority" from "within the scope of employment" by finding that "within the scope of authority" means that the agent has authority to *speak* for the employer. *Id.* For example, the authority of a chauffeur to drive the car would not include authority to make statements concerning driving the car. *Id.* McCormick also cites *Roush*, noted in the previous footnote, as an example of this application of scope of authority. *Id.*

See also *Missouri State Highway Comm'n v. Howard Constr. Co.*, 612 S.W.2d 23, 26-27 (Mo. Ct. App. 1981) (observing that statements would have been admissible under federal law and finding that the federal rule had not been adopted as the law in Missouri); *Nelson v. Holley*, 623 S.W.2d 604, 608 (Mo. Ct. App. 1981) (noting distinction between Missouri rule and the federal rules).

113. 612 S.W.2d 23, 26 (Mo. Ct. App. 1981).

114. *Id.*

persons to believe the employee could make statements for the employer.¹¹⁵ Apparent authority would be most likely to occur where the employee had executive capacity.¹¹⁶ The executive capacity requirement has been noted by a number of courts.¹¹⁷

IV. INSTANT DECISION

In *Bynote v. National Super Markets, Inc.*, the Missouri Supreme Court first noted that to make a submissible negligence case, Bynote had to show that National had or should have had knowledge of the dangerous condition.¹¹⁸ Her only evidence indicating that National had knowledge of the spill was her testimony about the statements of the checker and bagger. Therefore, the admissibility of that testimony therefore was the crucial issue in the case.¹¹⁹

National's argument that the testimony was inadmissible hearsay prompted the court to discuss hearsay in general.¹²⁰ The court noted that the parties used the phrase *res gestae* in their briefs to describe exceptions to the hearsay rule.¹²¹ Citing precedent and WIGMORE, the court determined that the phrase was useless because all of its applications are covered by some other principles of evidence. In addition, the court found that use of the phrase was possibly even harmful because its ambiguity results in confusion and creates uncertainty.¹²² The court held that the phrase *res gestae* would no longer be recognized in support of or in opposition to offered testimony.¹²³

The court then discussed three possible bases for admitting the statements of the bagger and checker despite the fact that they were hearsay. The first was the state of mind exception. The court did not discuss the general state

115. Gary Surdyke Yamaha, Inc. v. Donelson, 743 S.W.2d 522, 524 (Mo. Ct. App. 1987).

116. *Id.*

117. Benner v. Johnson Controls, 813 S.W.2d 16, 19 (Mo. Ct. App. 1991); Schultz v. Webster Groves Presbyterian Church, 726 S.W.2d 491, 496-97 (Mo. Ct. App. 1987), *overruled by*, Bynote v. National Super Markets, Inc., 891 S.W.2d 117 (Mo. 1995); Gary Surdyke Yamaha, 743 S.W.2d at 524; Kansas City v. Keene Corp., 855 S.W.2d 360, 367 (Mo. 1993).

118. *Bynote*, 891 S.W.2d at 120.

119. *Id.*

120. *Id.*

121. *Id.* at 121.

122. *Id.* (citing State v. Williams, 673 S.W.2d 32, 34 (Mo. 1984), and quoting 6 WIGMORE ON EVIDENCE § 1767 (Chadbourne rev. 1976)).

123. *Id.*

of mind exception in Missouri, but instead moved directly to a discussion of the exception when state of mind testimony is used to show that the defendant had notice of a dangerous condition. The court said that when using state of mind testimony to show notice, there are two distinct categories: (1) statements of a declarant when the declarant is the party against whom the testimony is offered and (2) statements of a declarant made *to* the party against whom the testimony is offered, i.e. testimony heard by the opposing party which would give notice.¹²⁴ The first category is admissible if the statement is made *prior* to the slip and fall.¹²⁵ Here, because the checker and bagger made their statements after the accident, the testimony was not admissible under the first category.¹²⁶

According to the court, the second category is not hearsay because such testimony is not offered to show the truth of the declarant's statements. Rather, it is offered to show the fact that the statements *were made* to the party and that, as a result, the party had notice of the dangerous condition prior to any injury.¹²⁷ The court found that when a statement showing knowledge is made after the accident, as it was here, it is not admissible as non-hearsay because it is being used to prove the truth of the matter asserted:

[T]he only way the trier of fact can decide whether the defendant knew of the dangerous condition before the slip and fall is to conclude that the out-of-court declarant's after-the-fact statement concerning the existence of the condition prior to the incident is true.¹²⁸

The court next addressed the second possible basis for admitting the testimony: the excited utterance exception to the hearsay rule. To fall within this exception, the court found that there must be a startling event which overcomes normal reflection so that the declaration is just a spontaneous reaction to the startling event.¹²⁹ The court listed four factors to be considered in determining whether a statement was an excited utterance: (1) the time elapsed between the event and the declaration, (2) whether the declaration was in response to a question, (3) whether the declaration was self-serving, and (4) the mental and physical condition of the declarant at the time of the declaration.¹³⁰

124. *Id.*

125. *Id.* (emphasis added).

126. *Id.*

127. *Id.*

128. *Id.* at 122.

129. *Id.*

130. *Id.* The court quoted *Jones v. Wahlic*, 667 S.W.2d 729, 731 (Mo. Ct. App. 1984). The court also stated that the burden of showing that the statement was an

Applying those factors, the court found that (1) the declarations and the startling event were in close proximity, but that there was no evidence that either employee actually witnessed the startling event (Bynote's fall), (2) neither responded to a question, (3) both offered self-serving statements, and (4) neither appeared to suffer mental or physical stress, or even seemed very excited, as a result of the fall.¹³¹ In addition, the court noted that the statements made by the employees were not even about the fall itself, but about cleaning up the spill.¹³² The court cited the rule that to be an excited utterance, the statement must pertain to "something done, seen or heard by the speaker in the course of the accident."¹³³ As a result of this analysis, the court held that the statements were not excited utterances, and, therefore, the trial court erred in admitting them as such.¹³⁴

The final possible basis for admitting Bynote's testimony addressed by the court was admission of a party-opponent.¹³⁵ The court stated that the rationale for this exception is that the party now objecting originally authorized the statement.¹³⁶

The court then addressed the trial court's finding that the statements here could not be admitted as admissions of a party-opponent because neither the bagger nor the checker held executive positions within the defendant's company.¹³⁷ The court held that an executive capacity requirement was unnecessary because it is not necessarily true that an employee without executive capacity can never bind the employer. An admission of an agent or employee will be admissible against the employer where the employee was acting within the scope of his authority when the statement was made.¹³⁸

Applying the rule to the facts, the court found that the evidence was sufficient to show that the bagger and checker were employees of National at the time of the admissions and that the statements were within the scope of

excited utterance is on the party offering it.

131. *Id.* at 122-23.

132. *Id.* at 123.

133. *Id.* (citing *Straughan v. Asher*, 372 S.W.2d 489, 496 (Mo. Ct. App. 1963)).

134. *Id.* The court found that the inquiry should continue because if there is another valid basis for admission of the statements, the defendant suffered no prejudice and the trial court's judgment should not be disturbed. *Id.*

135. *Id.* The court did not discuss admissions of party-opponents in general; it focused on vicarious admissions of a party-opponent, or imputing admissions made by employees or agents to the party-opponent.

136. *Id.*

137. *Id.*

138. *Id.* at 124. Obviously, as the court notes, this requirement will most likely be met where the employee is an executive, but the employee is not required to be an executive.

their duties.¹³⁹ Therefore, the statements were admissible as vicarious admissions of National.¹⁴⁰ The court then decided that the statements provided the evidence necessary to show National's knowledge of the dangerous condition prior to Bynote's accident; therefore, Bynote made a submissible case. The trial court was correct in overruling National's motion for directed verdict.¹⁴¹

V. COMMENT

Bynote is notable because it is one of the few recent Missouri Supreme Court decisions to address hearsay exceptions in any detail. In doing so, the court made a number of important statements.

First, the court finally laid to rest the imprecise and misleading phrase *res gestae*.¹⁴² Courts and attorneys in Missouri no longer have the option of asserting the *res gestae* exception when they are unsure of the actual hearsay exception which applies to the situation at issue.

This is a positive development. As noted above, legal scholars have been criticizing the use of the term for many years.¹⁴³ Also, the law surrounding the use of *res gestae* is hopelessly confusing given its large number of applications and the imprecision of its use.

The court also eliminated an interesting restriction on the use of the vicarious admission exception which had developed in Missouri.¹⁴⁴ It should now be clear that executive capacity is not essential for finding a vicarious admission. This should significantly broaden the scope of the exception in those courts that previously applied the executive capacity requirement.

It is unclear, however, whether that will occur. The elimination of the executive capacity requirement could be an indication that Missouri is moving toward adoption of the more expansive "scope of employment" exception used in the federal system. On the other hand, the court's use of *Roush* for its statement of the correct rule seems to contradict any such indication since *Roush* applied the narrower "scope of authority" exception.¹⁴⁵ Despite citing *Roush*, the court then seemed to follow the broader "scope of employment" rule when evaluating the facts of this case.¹⁴⁶ Therefore, the exact direction

139. *Id.*

140. *Id.*

141. *Id.*

142. See *supra* note 123 and accompanying text.

143. See *supra* note 62.

144. See *supra* note 138 and accompanying text.

145. *Bynote*, 891 S.W.2d at 124.

146. *Id.*

Missouri courts will take in applying the vicarious admission exception is unclear.

The court's application of the state of mind exception to the facts of this case is less than clear. The court cited a few cases in support of its analysis, and, as a result, it is difficult to determine how this analysis fits into previous Missouri law on the state of mind exception. However, there does not appear to be any significant departure from existing law.

VI. CONCLUSION

Bynote v. National Super Markets, Inc. is an interesting opinion in that the court addresses hearsay exceptions in more detail than usual. The abandonment of *res gestae* and the executive capacity requirement for vicarious admissions are important and positive developments.

AMANDA BARTLETT MOOK

